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IN THE

Supreme Court of the United States

No. [redacted] 142

October Term, 1963

STATE OF FLORIDA, ex rel., NORBERT FOX, individually, and as next friend and legal custodian of DEBORAH ANN FOX and DENISE MARIE FOX, his two minor children,

Petitioner,

- vs -

FLORENCE J. WEBSTER, formerly known as FLORENCE J. FOX,

Respondent.

On Petition For a Writ of Certiorari To the District Court of Appeal of Florida, Third District

BRIEF FOR THE RESPONDENT IN OPPOSITION

EVERETT H. DUDLEY, JR.
Attorney for Respondent
296 East Third Avenue
Hialeah, Florida

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IN THE

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Petitioner,

- vs -

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BRIEF FOR THE RESPONDENT IN OPPOSITION

PREFACE

The Petitioner below, Norbert Fox, will be referred to as the Petitioner or husband and the Respondent below, Florence J. Webster, formerly known as Florence J. Fox, will be referred to as the Respondent or wife.

The wife's present husband will be referred to by his own name. The following symbols will be used.

"R" for "Record on Appeal"

"P" for "Petition for Writ of Certiorari"

"PA" for "Petitioner's Appendix"

"SA" for "Supplemental Appendix of Respondent"

"PX" for "Petitioner's Exhibits"

"RX" for "Respondent's Exhibits"

All emphasis is that of the Respondent unless otherwise indicated.

JURISDICTION

It is respectfully contended by the Respondent that the Petitioner is erroneously seeking to invoke the jurisdiction of this Court under 28 U.S.C. Section 1257 (3) inasmuch as no title, right, privilege or immunity of the Petitioner has been denied, abridged or drawn in question.

QUESTIONS PRESENTED

(1) DID A FLORIDA COURT, IN DETERMINING THE QUESTION OF CUSTODY OF CHILDREN WITHIN ITS JURISDICTION, IMPROPERLY DENY FULL FAITH AND CREDIT OR COMITY TO A VOID OHIO DECREE PURPORTING TO CHANGE THEIR CUSTODY TO THE FATHER SUBSEQUENT TO A VALID OHIO DIVORCE DECREE GRANTING CUSTODY TO THE MOTHER?

(2) DID THE SAID FLORIDA COURT IMPROPERLY DENY FULL FAITH AND CREDIT OR COMITY TO A CALIFORNIA DECREE PURPORTING TO RECOGNIZE BY COMITY, WITHOUT REGARD TO ITS MERITS, THE SAID VOID OHIO DECREE?

STATEMENT OF THE CASE

Norbert Fox, on April 12, 1962, filed a Petition for a Writ of Habeas Corpus against his former wife, Florence J. Webster, formerly known as Florence J. Fox, seeking custody of the two minor children who were born to the parties during their marriage (R.Vol.II, 19-24). As grounds for his Petition, the husband, Fox, relied upon an Order of the Ohio Court of Common Pleas, dated 8 October, 1960, allegedly granting him custody of the children (PX 2) and a subsequent Order of the Superior Court of the State of California purporting to recognize, by comity, the Order of the Ohio Court (R.Vol.VI, 182, PA 32-33). On the same day, April 12, 1962, a Writ of Habeas Corpus issued from the Circuit Court of Dade County, Florida, ordering the wife to produce the children and to show cause why they should not be released to the husband (R.Vol.II, 25).

Thereafter, following an extensive hearing during which many exhibits and the oral testimony of numerous witnesses were presented, the Court, on May 8, 1962, entered a final Order adjudging that, for the best interests and welfare of the minor children, their care and custody should remain with the Respondent-mother. (R. 332, P 15). Subsequently, the Petitioner-husband appealed to the District Court of Appeal, Third District, of the

State of Florida. After the filing of briefs and oral argument of counsel, the said Appellate Court affirmed the Trial Court in a two to one decision on March 12, 1963, (Rehearing denied April 2, 1963) **State ex rel Fox v. Webster**, 151 So.2d 14, (Fla.App. 1963)(PA 1-6).

Subsequently, on May 29, 1963, the Petitioner-husband filed his Petition for Writ of Certiorari with the Supreme Court of Florida (R.Vol.I, 1-13). The Writ issued on October 28, 1963 (R.Vol.V, 337, PA 7). After hearing oral argument of counsel, the Florida Supreme Court determined that the Petition was without merit and thereupon discharged the Writ and dismissed the Petition on January 22, 1964 (R.Vol.V, 338, PA 8). Thereafter, on March 2, 1964, the Supreme Court of Florida denied the Petitioner-husband's Petition for Rehearing (R.Vol.V, 341), whereupon he filed his Petition for Writ of Certiorari in this Court.

In his statement of the Background of the Controversy (P 4-15), the Petitioner has once again incorporated an outrageous presentation of scandalous, distorted, biased and impertinent reargument of the alleged facts brought out in the Trial Court, the District Court of Appeal of Florida, Third District, and in the Supreme Court of Florida. The said alleged facts do not accurately and faithfully reflect the existing record and, in the opinion of the Respondent, the presentation of the same in the Petition for Writ of Certiorari is a violation of the spirit and letter of the rules of this Court. (See Supplemental Appendix) (SA 1-7)

ARGUMENT

Throughout all levels of the proceedings below, the Respondent has continuously maintained and proved the following basic contentions which lie at the heart of the litigation here being considered.

(a) That the Ohio Decree of October 8, 1960 (R.Vol. VI, 87, PX 2, PA 10-12), **which required Respondent to act on or before October 4, 1960, four days prior to its entry,** was for this, and the many other reasons expressed in the proceedings below, void on its face at the time it was entered and was therefore, under Florida law, not entitled to consideration by the Florida Court either under the doctrine of comity or under the provisions of the Full Faith and Credit Clause of the United States Constitution.

With reference to the matter of full faith and credit, the Florida Supreme Court expressed this view in deciding the case of **Milligan v. Wilson** (Fla.1958) 104 So.2d 35, 36, when it stated:

> " . . . that under Article IV of the Constitution of the United States, full faith and credit is accorded only to valid judgments of the courts of sister states."

As to comity, in **State v. Rasco** (Fla.1939) 139 Fla. 349, 190 So. 510, 511, the Florida Supreme Court said:

> " . . . the doctrine of comity plays no part in the adjudication of such cases [child custody cases]. Neither are decrees in such cases protected by

> the full faith and credit provisions of the Federal Constitution. This on the theory that the welfare of the child is the question of primary consideration, and this can best be determined by the Court who has jurisdiction of it and in whose jurisdiction it resides."

(b) That the California Court, by choosing to recognize by comity the void Ohio decree, was incapable of curing its defects or of giving it any greater validity than it enjoyed at the time it was entered; therefore, the Order of the California Court (R.Vol.VI, 182) was without substance and amounted to a nullity which could not command adherence from the Florida Court under the Full Faith and Credit Clause of the Federal Constitution or under the doctrine of comity.

While it is true that a Florida Court has apparently not ruled directly on the specific point, the Supreme Court of Alabama clearly expressed the law involved on this point in the case of **Mobile County v. Williams** (Ala. 1913) 180 Ala.639, 61 So.963, 965, when it stated:

> "A **void** thing is a no thing. It has **no** legal effect whatsoever and no rights whatever can be obtained **under it or grow out of it.** In the law it is the same thing as if the **void** thing had never existed." (emphasis supplied)

(c) That irrespective of the validity or invalidity of the Ohio decree (R.Vol.VI, 87, PX 2, PA 10-12) and the effect thereon of the ruling of the California Court (R.Vol.VI, 182), the Florida Courts have consistently held that in custody cases the question of the welfare of the

child is of paramount importance and that it is the duty of the Court to determine for itself what would be for the best interests and welfare of children within its jurisdiction and in the custody of which parent their interests would best be served.

The Florida Supreme Court, in deciding the case of **Di Giorgio v. Di Giorgio** (1943 Fla.) 153 Fla.24, 13 So.2d 596, 597, involving circumstances similar to those in the case at bar, said:

> "The law is and has been from time immemorial that each state is not only empowered but is charged with the duty to regulate the custody of minors within its borders."

In **Neal v. State** (1961 Fla.App.) 135 So.2d 891, 895, the Florida Court said:

> "The public policy of Florida, as reflected by the rulings of our Supreme Court, impels the view that in custody proceedings a decree of a foreign jurisdiction involving that issue shall give way to a decree based upon the best interests of the minors involved."

To the same effect, see also **Rhodes v. Bohn** (1959 Fla.App.) 135 So.2d 891, Aff. 121 So.2d 779; **Tom v. State** (1963 Fla.App.) 153 So.2d 334; **Avery v. Heermance** (1962 Fla.App.) 138 So.2d 775.

The Respondent has no argument with the position taken by the Petitioner that in most states, including Ohio and Florida, the governing factor in custody cases

is the welfare of the child. However, throughout the proceedings below, the Petitioner has consistently maintained that it was incumbent upon the Respondent, in order to obtain custody of the children here involved, to show such a change of circumstances, relating to the Petitioner subsequent to the Ohio Decree of October 8, 1960 (R.Vol.VI 87, PX 2), as to warrant a change of their custody to her.

Assuming, without admitting, that a change of circumstances must be shown in such cases, it is the position of the Respondent, as it has been throughout the proceedings below, that the burden of proving such changed circumstances has at all times rested upon the Petitioner; this for the reason that prior to the proceedings below, where the issue of custody was litigated for the first time in a truly adversary manner, the only valid decree in existence affecting the custody of the children was the original Ohio Decree of Divorce of May 18, 1960 (R.Vol. VI 85, PX 1, RX A), which granted custody to Respondent. The Order of the Ohio Court of October 8, 1962 (R.VI 87, PX 2), besides being void on its face, was entered without a showing of any changed circumstances warranting a change of custody to the Petitioner.

Ohio law requires a showing of changed circumstances before custody of minor children will be changed from one parent to another, as it was pointed out in **Bastian v. Bastian** (1959 Ohio) 160 NE 2d 133, 136, 73 ALR 2d 1440, 1443:

> "The pole star in all custody matters between parents is, what is for the best interests of the child whose custody it is sought to change, sub-

> ject, however, to the rule that where a court has once decreed that a home with one of the parents is fit and proper, no subsequent change of custody should be made, unless there has intervened such changed conditions affecting the welfare of the child that a change of custody is required to promote the best interests of that child."

It is apparent that the order of October 8, 1960, (R.Vol.VI 87, PX 2) is directly contrary to such requirements of the Ohio law as pointed out in the Bastian case, supra, relied upon by Petitioner (P 20).

While it is true that the Ohio decree of October 8, 1960, (R.Vol.VI 87, PX 2) does refer to "changed conditions and circumstances since the date of the previous order", it is obvious that such "changed conditions and circumstances" referred to actually concern solely the fact that Respondent had left the State of Ohio with the two minor children contrary to the provisions of the Final Decree of Divorce (R.Vol.VI 85, PX 1, RX A). As it was pointed out in **Di Giorgio v. Di Giorgio**, supra, citing and following People ex rel **Wagner v. Torrence**, 94 Colo.47, 27 P.2d 1039, 1039:

> "The court fixed a new status for the children, not on any showing that their welfare required a change of custody, but as a part of the punishment of respondent for contempt and to maintain the authority of the court whose order had been violated. Is the interest and welfare of the children to be thus determined and possibly jeopardized on account of parental indifference to an Order prohibiting removal from the State?

> We think not . . . Violation of the removal order did not of itself defeat her custody. It subjected her to punishment for contempt. When she became domiciled in Colorado, it became the domicile of the children."

For the foregoing reasons, and based upon the authorities above quoted, it is respectfully submitted that there is no Federal question properly to be considered by this Court. In language so eloquently expressed by the Honorable Mr. Justice Frankfurter, in his concurring opinion, in **May v. Anderson** (1953) 35 US 528, 97 L Ed 1221, 1228, 73 S Ct 840, it was said:

> "Interests of a State other than its duty towards children may also prevail over the interest of National unity that underlies the Full Faith and Credit Clause. But the child's welfare in a custody case has such a claim upon the State that its responsibility is obviously not to be foreclosed by a prior adjudication reflecting another State's discharge of its responsibility at another time."

In his dissenting opinion in **Kovacks v. Brewer** (1958) 356 US 604, 2 L Ed 2d 1008, 1014, 78 S Ct 963, Mr. Justice Frankfurter again stated, with respect to the extra-territorial effect of custody decrees:

> "Because the child's welfare is the controlling guide in a custody determination, a custody decree is of an essentially transitory nature.
>
> • • •

"... a court that is called upon to determine to whom and under what circumstances custody of an infant will be granted cannot, if it is to perform its function responsibly, be bound by a prior decree of another court, irrespective of whether 'changes in circumstances' are objectively provable.

* * *

"In short, both the underlying purpose of the Full Faith and Credit Clause and the nature of the decrees militate strongly against a constitutionally enforced requirement of respect for foreign custody decrees."

CONCLUSION

It is respectfully submitted that, in the proceedings below, no title, right, privilege or immunity of the Petitioner has been denied, abridged or drawn in question so as to invoke the jurisdiction of this Court under 28 U.S.C. Section 1257 (3) and that, inasmuch as the Petitioner has not been improperly denied the benefit of the Full Faith and Credit Clause of the United States Constitution or the provisions of the doctrine of comity, his Petition for Writ of Certiorari should be denied.

Respectfully submitted,

EVERETT H. DUDLEY, JR.
Attorney for Respondent
296 East 3rd Avenue
Hialeah, Florida

SUPPLEMENTAL APPENDIX

STATE OF FLORIDA, ex rel., NORBERT FOX, individually, and as next friend and legal custodian of DEBORAH ANN FOX and DENISE MARIE FOX, his two minor children,

Petitioner,

-vs-

FLORENCE J. WEBSTER, formerly known as FLORENCE J. FOX,

Respondent.

SUPPLEMENTAL APPENDIX TO BRIEF FOR RESPONDENT IN OPPOSITION

The Respondent is reluctant to permit the facts as related by the Petitioner to stand uncorrected but is perplexed as to how to reply to the same and at the same time stay within all pertinent rule requirements which, in the interpretation of Respondent do not permit such remarks to be contained in the body of the brief. Accordingly, the Respondent begs the indulgence of this Court and, as an addendum and appendix to the foregoing Brief in Opposition to Petition for Writ of Certiorari sets forth below pages 16 through 24, inclusive, of the Brief of Respondent in Opposition to Petition for Writ of Certiorari heretofore filed in the Supreme Court of Florida for the reason that they adequately represent the corrections which Respondent would make to the distorted version of the facts related by the Petitioner. References to Record and pages correspond with the Record filed in the Supreme Court of Florida.

PROTEST AS TO PETITIONER'S STATEMENT OF FACTS

The facts of this case, which have been argued at length both in the Trial Court and in the briefs and oral argument before the District Court of Appeal, are again reargued by the Petitioner in his Petition for Writ of Certiorari and accompanying brief.

The facts, as related by the Petitioner are, as they were in his former brief and in his oral argument, grossly inaccurate, replete with half-truths and constitute an apparent, if not deliberate, attempt to distort the record, which fortunately speaks for itself, and to tailor it to suit his own ends.

Without attempting to burden this Court with another prolonged dissertation of the facts, the Respondent, in order to protect herself from all eventualities, reluctantly feels impelled to point out to this Court, as evidence of the Petitioner's lack of candor, the following:

THE RECORD CLEARLY SHOWS—

1. Contrary to the impression which the Petitioner would create, the Respondent and her present husband are exceptionally good parents; they provide the children with a happy home, immaculately clean, with good neighbors (R 126-129) (SA 10). They are a well integrated family and the Respondent and her husband show a great deal of interest in the children. Deborah Ann attends school regularly, is generally an average student and receives a great deal of help at home from the Respondent

and her husband (R 236-237)(SA 13). She is emotionally well adjusted and is well liked by the children at school.

Both children attend the Catholic Church regularly (R 114)(SA 15) and the wife uses her best efforts to raise them in the Faith (RX B)(SA 16), sometimes with considerable personal hardship to herself (R 187-188)(SA 16). The wife makes most of the children's clothes herself (R 113)(SA 15). Both children are in good health and lack for nothing reasonably necessary for their happiness and well being (R 129)(SA 12).

2. The Petitioner relates that the Respondent, prior to her divorce from him, engaged in certain extra-marital relations with her present husband. While this is not denied by the Respondent, it does not appear that the said extra-marital relations were of a continuing nature for which she should forever be condemned. (See page 13 of this brief)

"In **Kenimer v. Senter,** supra, under like circumstances, in which the Supreme Court of Florida denied certiorari, the Circuit Court of Dade County, speaking through Judge Charles A. Carroll, said:

> 'Even if the parties had had an affair as charged by the plaintiff, that of itself would not disqualify the defendant to have custody of the child. It often happens that a woman married to one man becomes attracted to another. It is not unusual that where such woman has grounds for divorce a divorce is obtained and the parties so attracted to each other marry. Human nature being what it is, these things happen. It would

be a strange rule that would cause such an event to disqualify such a person to have custody of his or her children.'

"In **Carson, Florida Law of the Family, Marriage and Divorce**, Chapter 61, Sec. 5, P.728, the author states:

'The marital misconduct of one of the parents does not bar the right of custody. Thus custody may be properly awarded to a mother though the divorce be given to the father where it is not shown she is morally unfit to have custody. The fact the mother may have been divorced for adultery does not ipso facto militate against her right of custody. The circumstances of each such case must be investigated and the courts discretion in the matter is a wide one, not necessarily based on punishment or reward of the litigants.'"

3. The Petitioner asserts that the Respondent traveled across the continent with a certain Jim Whitely, of whom she had a picture suitable for framing, and that they planned to spend the night at the home of his cousin (P 5, PB 4). However, the Petitioner does not mention that the trip was made by air; that they were accompanied by their children, one of whom was very ill, and that they did not spend the night in New York (R 169) (SA 17).

4. The Petitioner points out that at the time she entered the separation agreement, wherein she was to have custody of the children, the Respondent knew her present husband was to be assigned to Los Angeles and

that she did not intend to keep her part of the agreement vital to Petitioner (P 6, PB 6). However, the Petitioner does not mention that, at the time of her marriage to her present husband, Mr. Webster's application for transfer back to Cleveland had been in for months and that they anticipated living in Ohio (R 76-77)(SA 18).

5. The Petitioner charges that the wife removed the children from the State of Ohio and went to California on August 4, 1960, contrary to the advice of her Ohio attorney (P 6, PB 6). However, the Petitioner fails to state that the Respondent had never met her Ohio attorney, that he had refused to see her, and that she acted upon the advice of her California attorney in whom she had confidence (R 154-155, R 175-176)(SA 18).

6. The Petitioner asserts that while in California the Respondent worked in a bar and restaurant and that she and her husband worked opposite shifts so that they would not have to pay a baby sitter (P 7, PB 7). The record shows that the establishment where she was employed enjoyed a very good reputation (R 86)(SA 21); that she would not have worked if it had been necessary for her to have the children cared for by strangers and that the purpose of her working was simply to provide for some of the extra luxuries and material things which they might not otherwise have had (R 178-180)(SA 22).

7. The Petitioner states that the Respondent admits signing the United States postal receipt for the report of the Department of Domestic Relations on the 26th of September, 1960, (P 7, PB 7, PX 4)(R 156)(SA 23). In this the Petitioner is patently inaccurate. The Respondent admits signing a United States postal receipt on the date

stated, however, the record does not show that it is the same postal receipt as the Petitioner asserts accompanied the report of the Department of Domestic Relations. The number was conveniently missing from the postal receipt photostated and submitted in evidence by the Petitioner at the trial (PX 4). The Respondent emphatically denied ever receiving the report of the Department of Domestic Relations (R 267-268) (SA 24).

It is significant, however, that the report of the Department of Domestic Relations recommending that custody of the children be changed to the Petitioner (PX 4) contains no information about the Respondent, and that, in spite of such recommendations, the Ohio Court did not find that the Respondent was not a fit person to have custody of the children.

The Petitioner makes great point in his brief (PB 10) that the California Court later granted the Petitioner a Writ of Habeas Corpus on the basis of the alleged validity of the Ohio Order, which he purports granted him custody. He avoids mentioning, however, that in conjunction with its ruling, the same California Court said:

> "I find in this case that both parties would be, if I had the matter of custody in de novo, that I would find both parties are fit and proper parties to have the custody of these children."

(See also (R 167-168) (SA 24) Statement by Mr. Louis)

8. The Petitioner asserts that the Respondent admitted issuing at least one bad check on her account without sufficient funds (R 94, P 9, PB 11). However, the

record shows that there was no wrongful intent on the part of the Respondent and that she fully believed that there were sufficient funds in her account to cover the check (R 94)(SA 25).

9. The Petitioner charges that the wife admits knowing the police were looking for them (P 9, PB 11, R 94). However, it is clear on the record, and conveniently overlooked by the Petitioner, that the police referred to were personal friends of the Respondent and her present husband and that their inquiries were made out of friendly interest (R 94-95)(SA 25).

10. It is asserted by the Petitioner (P 9, PB 11) that the Respondent and her present husband drove from Los Angeles to Miami in a truck and camper, which had not been fully paid for, and abandoned them at the Miami Airport. The record clearly shows that they did not intend to violate the law in this regard, assuming, without admitting, that they did so, and that they took affirmative steps to see that the property was properly cared for and returned (R 189-190)(SA 26).

11. The Petitioner states that Deborah Ann was uprooted from school and did not attend school during the four months she was in Puerto Rico (R 96, P 9, PB 11). He does not mention, however, that during that time, according to the record, Deborah was tutored daily at home by the Respondent who received the necessary books and supplies from the Parochial School (R 96-97)(SA 26). It further appears from the record that since their return to Florida, the Respondent has used her best efforts to enroll the child in a Parochial school, in accordance with her agreement with the Petitioner, and has failed in

her efforts only because of a lack of classroom space due to the current Cuban situation (R 193)(R 26).

12. Nowhere in the record does it appear that the Respondent and her present husband have not had, or do not have sufficient funds to meet their needs was when they were unable to raise, on a moment's notice, the bondsman's fee, in the amount of $500 in compliance with the Order of the Trial Court (R 10-11). It is significant, however, that they had acquaintances with sufficient confidence in their character and integrity to lend them their entire savings for that purpose (R 316)(SA 28).

13. The Petitioner would have the Court believe that the Respondent and her husband are renting a two-bedroom house, sharing their bedroom with their son and the three girls sharing the other bedroom (P 9, PB 11). Yet it was pointed out in the Respondent's brief and in Oral Argument before the District Court of Appeal that since the hearing before the Trial Court that the Respondent and her present husband have purchased a large home, having three bedrooms and ample living space for their needs in a desirable neighborhood.

14. Petitioner avers (PB 12) that his parents who are in 'perfect health' would watch over the children when he was working, should he be awarded custody. He does, however, neglect to state that the age of his mother is 61 and his father is 67 (R 199)(SA 29).

15. The Petitioner states (P 10, PB 12) that when he first saw Deborah Ann in Florida, she ran up, hugged and kissed him (R 201)(SA 7) but since the proceedings she hides and refuses to give him a kiss. However, the

Petitioner again conveniently avoids mentioning that at the first time he saw Deborah, according to his own testimony on record, he did not inform her that he intended to take her away from her mother and that it has only been since this fact has become known to her that her attitude toward him has cooled (R 227-228) (SA 29).

16. The Petitioner, throughout his brief, implies that his driving desire is to provide for the best interests and welfare of his children.

However, since the rendition of the Ohio Order, which he alleges awarded him custody of the children (PX 4) the record shows that he has contributed nothing toward their support (R 224-225) (SA 30); instead, he has imposed this obligation upon the Respondent and her present husband. The fact that Mr. Webster has fulfilled this duty is beside the point.

PROOF OF SERVICE

I, Everett H. Dudley, Jr., attorney for Florence J. Webster, formerly known as Florence J. Fox, respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 26th day of June, 1964, I served a copy of the foregoing brief and appendix on Norbert Fox, petitioner, by mailing a copy in duly addressed envelope, with first class postage prepaid, to his attorney of record, as follows:

To: Paul A. Louis, Esq., Attorney for Petitioner
1601 Alfred I. duPont Building,
Miami, Florida 33131

Everett H. Dudley, Jr.
Attorney for Respondent
296 East Third Avenue
Hialeah, Florida